SUPREME COURT, U S

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BEFORE THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 114*

FREIGHT FORWARDERS INSTITUTE, *Appellant*,

v.

PACIFIC COAST WHOLESALERS' ASSOCIATION, ET AL., *Appellee*.

BRIEF ON BEHALF OF FREIGHT FORWARDERS INSTITUTE.

HARRY C. AMES,
Attorney for Appellant.

* The proceeding also embraces No. 113, *United States et al.* v. *Same*.

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OPINION BELOW.

This appeal is from the decision in *Pacific Coast Wholesalers' Asso.* v. *United States*, 81 Fed. Supp. 991.

JURISDICTION.

The final decree of the three-judge district court was entered on February 18, 1949 (R. 62). Petition for appeal was presented and allowed on April 12, 1949 (R. 63). The jurisdiction of this court is conferred by the Judicial Code, as revised by the act approved June 25, 1948, effective September 1, 1948, Title 28 U. S. Code §§1253 and 2101(b),

consolidating and continuing the substance of prior provisions of law relating to direct appeals from decisions of three-judge courts in suits to set aside orders of the Interstate Commerce Commission. This court entered its order noting probable jurisdiction on October 10, 1949 (R. 772).

QUESTIONS PRESENTED.

1. Whether the Interstate Commerce Commission (hereinafter called the Commission) erred in concluding that the respondent association was not operating "on a nonprofit basis" in handling shipments sold to its members "f.o.b. destination" and making refunds to its members of portions of the freight charges paid on such shipments.

2. Whether the Commission erred in concluding that as to such shipments the respondent association was serving the nonmember consignors and hence the general public within the meaning of the law.

3. Whether there was a rational basis for the decision of the Commission.

4. Whether the court below erred in turning its entire decision on the agency relation existing between the respondent association and its members.

STATUTES INVOLVED.

The statutes involved are sections 402(a)(5); 402(b); 402(c)(1) and (2); and 410(a) of the Interstate Commerce Act and the National Transportation Policy. The pertinent provisions are set forth in the appendix.

STATEMENT.

In 1934, seven receivers of automotive supplies, located in California, met for the purpose of "Organizing a Freight Forwarding Association." Their goal was to bring the receipts of the group up to a minimum of 300,000

pounds per month (R. 90—Exhibit 2). This was long prior to the Federal regulation of the freight forwarding industry, which came in May, 1942.

From the time of its inception the original group continued to grow and expand. From an original membership of seven receivers of a single commodity description—automotive supplies--with receipts of 300,000 pounds per month (3,600,000 pounds per annum) it has grown to a group of some 38 receivers of a widely diversified list of commodities[1] in 7 western States, handling a total tonnage (in 1944) of 42,018,232 pounds (R. 17). It is significant that the growth and development of the organization, both memberwise and tonnagewise, suddenly gained tremendous impetus coincident with the regulation of the freight forwarding industry in 1942. For example, there were 18 members in 1939 and 38 in 1944. The total tonnage handled jumped from 19,650,654 pounds in 1942 to 44,070,867 in 1943, the first year of the forwarder regulation (R. 17). This, in itself, suggests a profit motive seeking competitive advantage through an apparent loophole in the law against a foe whose hands were tied.

It is not questioned that the physical operations of the association, i.e., the assembly of small shipments into carload lots for movement to break-bulk points for distribution, are exactly the same as those of the regulated freight forwarder; that the published charges of the latter are assessed in the first instance against the consignee members or the consignor-nonmembers of the association; that every pound of freight handled through the association is freight which can and might otherwise be handled by the regulated forwarders; and that refunds, ranging up to 45 cents per 100 pounds, are later made to the consignee members on

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[1] Including, in addition to automotive supplies, those received by shipbuilding companies; hardware jobbers; mine and smelter supply companies; marine supply companies; bridge and dredging companies; and engineering companies.

basis of the tonnage handled through the association (R. 16, 17-383).

Similarly, there is no question that the regulated freight forwarder must publish, collect, and *retain* its tariff charge and that it cannot, in the nature of things, compete for the traffic against the refunds made by the association.

The Association has escaped regulation, and with it the duty to publish, collect, and retain *its* charges, by claiming exemption under par. (c)(1) of section 402 of the act.

THE PROCEEDINGS BEFORE THE COMMISSION.

Faced with this intolerable competitive situation the regulated forwarders, through their institute, appellant herein, petitioned the Commission to investigate the status of the association, which request was granted. In its first decision the Commission (Division 4) found in effect that the assocation and its activities fell within the sweep of the exemption in section 402(c)(1), and discontinued the proceeding (R. 22) (*Pacific Coast Wholesalers' Assn.—Investigation of Status*, 264 I. C. C. 134). The Institute thereupon petitioned for reconsideration and argument before the entire Commission.

On such petition the Commission (Division 4) reopened the proceeding and assigned it for further hearings. At such further hearings it developed that the freight charges on a substantial portion of the shipments, on which the association made refunds, were either fully prepaid at point of origin by the consignor, or that the consignee, who physically paid the charges in the first instance, was allowed to deduct them, as such, from his invoice (R. 23 et seq.). As to such shipments the Commission found that:

> Simple logic would dictate the conclusion that in handling shipments on which freight is borne by nonmember consignors, the association is operating for hire and therefore for profit (R. 32).

Upon such finding the Commission concluded:

(1) That the association's service in connection with shipments from nonmember consignors to member consignees and their customers of goods sold on a f.o.b. destination or delivered-price basis is not a service for the association's members and is not performed on a nonprofit basis within the meaning of section 402(c)(1) of the act.

(2) That the operations of the association as described in finding 1 are those of a freight forwarder in interstate commerce within the meaning of section 402 (a)(5) of the act, and that continuance thereof without a permit is in violation of section 410(a) of the act and therefore unlawful (R. 35, 36).

(3) That respondent Elmer J. Jensen, Jules H. Ernst, (since deceased), Percy T. Lyon, Ira C. Lambert, L. A. Lindroth, G. A. Olson, and Sol Smith, to the extent that they are parties to such unlawful operations, are likewise in violation of section 410(a) of the act.

The respondent association, and its officers, were admonished to discontinue the service and to notify the Commission of such discontinuance on or before March 19, 1948 (R. 36).

THE PROCEEDINGS BEFORE THE STATUTORY COURT.

After appropriate steps were taken to exhaust administrative remedies, complaint was filed in a three-judge court for the Southern District of California—Central Division—asking that the decision of the Commission be set aside and that it be enjoined from requiring respondent association or its officers to abstain from continuing to handle for and make refunds to its membership on shipments sold f.o.b. destination. In an opinion dated January 24, 1949, the lower court held:

The conclusions and requirements of the Commission predicated upon the report of December 18, 1947, have no rational basis, and must be set aside (R. 56).

SUMMARY OF ARGUMENT.

1. We stand squarely on the proposition that any operations of shippers or groups or associations of shippers which, simulating the functions of regulated freight forwarders, are operated on a profit basis are not within the scope of section 402(c)(1). We submit that it is sheer sophistry to argue that the receipt of "refunds" out of charges which are not paid by the recipients of such refunds, does not constitute a profit. In 50 C. J. 642 et seq., profit is defined as gain; (*Thorn* v. *De Bretuil*, 83 N. Y. S. 849) which might be the gain made in a business transaction (*Vidal* v. *South American Securities Co.*, 276 Fed. 655) or any acquisition beyond expenditure; (*Webster Int. D.* v. *Van Hoose*, 30 S. E. 783, 786); (*Mitchell* v. *Chicago etc., R. Co.*, 114 N. W. 622, 625); (*Carter* v. *Arnold*, 35 S. W. 584); (*Vital* v. *South American Securities Co., supra.*,) or a pecuniary gain in any transaction; (*Webster Int. D.* v. *Van Hoose, supra*); (*Mitchell* v. *Chicago etc. R. Co., supra*). In short, the term "profit" is broad enough to cover any sort of advantage, advance or gain, and benefit of any kind (*Simcooke* v. *Sayre*, 148 Iowa 132; 126 N. W. 816, 817).

The mechanics by virtue of which these refunds are fed back to the members by the general manager of the association—Olson—show, in themselves, the existence of a profit motive. As shown, the refunds consist of the balance, or difference between the freight charge based in the first instance on the published rates of the regulated forwarder, on the one hand, and the cost to the association—functioning through Olson—of (a) getting the individual shipments to the concentration point, Chicago, (b) moving the consolidated shipments in *carload* lots to the break-bulk points on the West Coast (and at Salt Lake City, Utah,

Phoenix, Ariz., and Yakima and Spokane, Wash.), (c) their distribution thence either to the consignee members, or, in some cases, directly to the customers of the latter, plus (d) Olson's commissions and certain other assessments, on the other hand (R. 12 et seq—23 et seq).

When shipments are consigned to the members with freight charges "collect"[2] the mechanics are relatively simple. The association pays the freight charges for its members and after deducting the above expenses for transportation, commissions, etc., refunds the balance. Similarly, when shipments are consigned to members on a "freight allowed"[3] basis the matter is not too complicated. In both types of shipment the money out of which the underlying carriers are paid passes in the first instance through the hands of the association. It is on the "prepaid" shipments that the association must really assert itself to get into a position to make a refund. In ordinary circumstances, as the term "prepaid" implies, the consignor-seller would prepay the full charge to the initial carrier and the association, not handling the money would have no funds out of which to refund. But the transactions are not allowed to proceed in the ordinary way. The consignor-seller is on the "credit" list of the receiving carrier, as well as that of the association. He is given written instructions to bill the shipments to the association at Chicago, with the ultimate consignee designated on the lower left hand corner of the bill of lading. He pays no money to the carrier. On the contrary, the association "advances" not only the charges to Chicago, but those to the West

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[2] The "cease and desist" requirement of the Commission does not run to this type of transaction (R. 36).

[3] Which means that while the freight charges are *physically* paid at destination by or on behalf of the member, he is allowed to deduct them, *as such*, from the face amount of his purchase invoice. This type of transaction is illustrated in *Louisville & N. R. Co.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217, 235, 237, 238.

Coast as well, and then bills the consignor-seller for the full charge of the regulated forwarder even to the extent of adding the 3 per cent transportation tax. If by any chance, the charges *to* Chicago have been actually prepaid by the seller they are deducted from the association's bill for the *full* charge (R. 26, 27). Thus the association having received from the consignor the *full* charges and having paid out a smaller sum to the underlying carriers, is in position to divide the difference or profit with the consignee-member who has never paid out a cent. To use the language of Mr. Olson at the further hearing:

> The so-called "prepaid shipments" are treated no differently by us than those on which charges are collected. We treat them all alike. They are all thrown in the hopper and the money comes rolling out (R. 604).

We repeat, it is sheer sophistry to look upon these transactions as being devoid of a profit motive, or to attempt to explain away the latter on the principle of agency.

2. We submit, also, that the Commission was correct in its conclusion that as to shipments sold "f.o.b. destination" the services rendered by the association through Olson are services for nonmembers and, hence, for the general public and that there is a holding out to render such services within the meaning of the statute (R. 35).

ARGUMENT.

THE DECISION OF THE COURT BELOW SACRIFICES SUBSTANCE FOR SHADOW.

In concluding that the "simple logic" of the Commission in finding that refunds out of charges not paid spells out an operation for profit, has "no rational basis" the lower court has turned its decision entirely upon the principle of agency. It concludes that because the "association" is the agent for its member principals, the "association" cannot be said to be operating for profit because its mem-

bers, not it, receive the refunds.[4] This is not only a decided oversimplification of the case but it ignores the very keystone of the agency relation—*qui facit per alium facit per se.*

The acts of an authorized agent with reference to the business in which he is at the time employed, and within the limits of his authority, are the acts of his principal (*State of Ohio ex rel Seney* v. *Swift & Co.*, (C. C. A. Ohio) 270 F. 141; certiorari denied, 257 U. S. 663; appeal dismissed 260 U. S. 146), the principal and agent being the same person in legal contemplation when the latter is acting within the scope of his authority (*Alex. Woldert Co.* v. *Citizens Bank, etc.*, 234 S. W. 124.)[5] And if the acts of the association, through Olson, are to be viewed as unlawful or tortious in the light of the statute, there can be no agency, as such, and all parties participating therein are principals.[6]

Moreover, the narrow view of the lower court with respect to the matter of "profit" is not in keeping with the language of the statute itself. The exemption runs only to shippers or groups or associations of shippers who pool or consolidate their shipments "on a nonprofit *basis.*" It does not identify the profit with the consignor, consignee, or the group or association, *as such.* Nor does it admit of any construction which holds that the receipt of something for nothing escapes the "profit" status simply because the details are handled by an association, as agent for the beneficiary. On the contrary, the reasonable construction points inevitably to the conclusion that the benefit of the exemption accrues only to those who through mutual acts of consolidation are able to reduce

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[4] It states specifically: "It is clear that there is no profit *to the association* from the activities described in the Commission's report" (R. 56).

[5] 2 C. J. S. 1182.

[6] 2 C. J. S. 1039, 1040.

charges which they would otherwise *pay for themselves* and would not run to those who save money on freight charges paid by others. If the ultimate result is a profit anywhere along the line the activities cannot be said to have been "on a nonprofit *basis*" and the exemption is destroyed.

The true distinction between the general freight forwarder, who handles traffic offered by the public generally, and the "shipper, or group or association of shippers" contemplated in par. (c) of section 402 is this: The former obtains his profit out of the difference between the less-than-carload rate which he charges his shipper (and which his shipper would pay without the intervention of the forwarder) and the lower carload or volume rate which he pays to the underlying carrier for the physical service of transportation, plus the costs incident to consolidation and breaking bulk. He is used by the public because his "consolidated" shipments move much more expeditiously.

The true shippers' association is a group of shippers, generally in the same line of industry,[7] who have orders for shipments of their goods in less-than-carload quantities. By pooling their shipments, they are able to pay a prorata share of the lower carload rate in lieu of the higher rate for less-than-carload shipments. Generally, their agent charges a fixed fee for the service of consolidating their shipments. In one sense these shippers "profit" in that they secure the benefit of a lower rate than they would otherwise pay. But in a broader sense they do not profit because they pay the published tariff rate for the service which they actually get. There is no prior payment of the higher rate so as to set up a difference or pool which they divide with their general manager, as they do here. In other words, they are pooling their freight "for the purpose of securing the benefits of carload, truckload, or other volume rates," an activity falling directly under the stat-

[7] Such as the paper industry, or the furniture industry.

ute. This type of activity has been going on for years; its legitimacy has never been questioned, certainly not by the orthodox forwarder, and Congress, without doubt, had no intention to disturb it or to bring it under regulation.

But, while legitimate pooling, such as that just described, has been exempted and properly so, Congress did see fit to add the qualifying words "on a nonprofit basis." The question is, then, at just what point does legitimate *non*-profit pooling become nonexempt because handled on a profit basis. Obviously, such a condition could arise in at least two ways: First, as is the situation here—the shippers could, through arrangements with their sellers, receive refunds out of charges paid or borne by the latter. As stated by the Commission, "simple logic" characterizes those transactions as of a profit motive. Secondly, and of grave importance to the regulated forwarding industry, these so-called agents could set themselves up as freight forwarders in every sense of the word and through the mere guise of incorporation secure their patrons in the form of members. We shall discuss this phase of the case in more detail later.

If, however, the decision of the lower court is to stand, the words "on a nonprofit basis" are denuded of any practical effect. In other words, if there is no profit in the types of traffic here under review it would be impossible to conceive of a situation in which an authorized forwarding operation "on a nonprofit basis" could become unauthorized because of profit.

FAILING THE NONPROFIT TEST THE ACTIVITIES OF THIS GROUP COME SQUARELY WITHIN THE DEFINITION OF A FREIGHT FORWARDER.

The statutory definition of a freight forwarder contains four separate elements. They are:

(a) There must be a holding out "to the general public to transport or provide transportation of property for compensation" (otherwise than as a carrier subject to part I, II, or III of the Act).

(b) There must be assembling and/or distributing operations with respect to the undertaking.

(c) There must be an assumption of responsibility for the transportation of such property from the point of its receipt to its ultimate destination, and

(d) There must be utilization of underlying carriers subject to part I, II, or III of the Act.

Throughout the proceeding appellee has conceded, tacitly at least, that the activities of Olson, who handles all of the details of the operation, meet elements (b), (c), and (d), as set forth above,[8] but it is now insisting that there is no "holding out to the general public" within the meaning of the definition.[9] On this phase of the case the Commission concluded:

> It is insisted in respondents' behalf that the association does not serve the general public. The association serves not only its 38 members but also *that part of the public from which those members purchase their supplies.* While the shippers thus referred to are not all the public, it is to be remembered that no man serves all of the public. *Terminal Taxicab v. District of Columbia,* 241 U. S. 252. In our opinion the facts stated warrant the conclusion that the association's service is held out to and performed for the general public (R. 35). (Emphasis ours)

In this connection the Commission referred to its decisions in *Phillips Packing Co., Inc., Common Carrier Application,* 260 I. C. C. 297, and *Toussaint Contract Carrier Application,* 41 M. C. C. 459, in both of which the carriers

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[8] As a matter of fact appellee from 1935, when motor carriers were regulated until 1942, when forwarders were regulated, published and filed with the Commission a regular tariff of its rates. It did this because it insisted that it should be entitled to have joint rates with motor carriers on the same basis as the regulated forwarder.

[9] The court below has agreed with appellee on this point (R. 56).

served only that part of the public having need therefor by reason of purchases of supplies (R. 35).

The decision below concedes, in effect, that where goods are sold "f. o. b. destination" either through the full prepayment of charges by the consignor, or by allowing the consignee who physically pays the charges to deduct them, as such, from the invoice price, the carrier is serving the consignor while the goods are in transit. This must be so from the fact that in such circumstances it is agreed that the consignor alone is entitled to reparation of any excess charges collected for the transportation. *Southern Pac. Co.* v. *Darnell-Taenzer Lbr. Co.*, 245 U. S. 531; *Louisville & N. R. Co.*, v. *Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217.[10]

But the lower court, without denying that in such circumstances the association is *serving* the nonmember-seller, strips it of all significance in the case because, in doing so, the association is acting as the agent of the consignee-member (R. 56). This we submit, is a lamentable failure to pierce the corporate veil.

The evidence, which is before the Court, shows plainly that the "association-corporation" is nothing more or less than a cloak to shield the activities of Olson in reaping all of the benefits of conducting a freight forwarding business without incurring any of the regulatory obligations incident thereto. Olson and his understudy, Sol Smith, not only met with the founders of the association initially (Exhibit 2) and have continually pressed for its expansion, but Olson has in fact directed the affairs of the association from its inception without the slightest semblance of any orders or instructions from the nominal officers of the group, even to the extent of leasing, in the name and

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[10] Compare also *United States* v. *R. P. Andrews Co.*, 207 U. S. 229, where the decision plainly infers that unless the negotiations of the parties show clearly to the contrary, "property" in goods sold "f. o. b. destination" remains in the seller and the transportation is "subject to his risk until delivery at destination."

at the expense of the association, a terminal at Chicago in which he owns a half interest. His annual compensation, based on a "commission" stated in terms per cwt., of freight handled amounts to more than $60,000. Until the heat of investigation indicated its propriety there had never been a meeting of the membership. And both the President and Executive Secretary testified that neither of them, by word or deed had ever made any suggestions to Olson as to the manner in which the business should be conducted (R. 18, 20, 21). Indeed, so far as his relations to the members is concerned, Olson might well be deemed to be an independent contractor.[11] Moreover, as we have shown, he must, in connection with these "f. o. b. destination" shipments keep in constant and intimate touch with the eastern producers in directing that their goods may be handled in such a manner that he may come into possession of the freight charges in order to make refunds.

In essence this situation is on all fours with that before the Court in *Davis* v. *People* (1926) 79 Colo. 642; 247 Pac. 801. In that case the Public Service Commission of Colorado had declined to issue to Davis a certificate of public

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[11] In 2 C. J. S. pp. 1027, 1028, the status of independent contractor is defined as follows:

> An agent and an independent contractor are not always easy to distinguish, and there is no uniform criterion by which they may be differentiated. Generally, however, the relations are distinguished by the extent of control which the employer exercises over the employee as to the manner in which he performs his work. Where the will of the employer is represented only in the result, and not in the means by which it is accomplished, and the employer retains no control over the employee as to the manner of accomplishing the desired result, the employee is an independent contractor and he, not his employer, is responsible for his own acts and contracts. And the relation is not changed by the employer's reservation of the right of supervision and approval.

convenience and necessity to operate as a common carrier by motor vehicle. Whereupon an "association" was organized consisting of some 121 members who acounted for 90 per cent of the potential traffic of the area. The corporate forms were duly observed, although the decision shows that so far as meetings and knowledge and supervision of the officers of the corporate affairs were concerned, the "association" was run about as loosely as the one in the instant case in its earlier or preinvestigation stages. Some of the statements of the learned justice are highly significant. As to the dealings with members he said (p. 802):

> Defendant (Davis) has a contract with the association binding him to haul for those only who belonged to it, but accepted shipments from *nonmembers to members* and vice versa on the order and payment of either. (Emphasis ours).

While respondent here makes no refunds to nonmembers it cannot be denied, particularly as to "prepay" and "freight allow" shipments, that it is handling shipments for account of nonmembers.

Continuing his discussion on the corporate veil, the learned justice stated (p. 802):

> Contrary to public opinion, mere schemes to evade the law, once their true character is established, are impotent for the purpose intended. *Courts sweep them aside as so much rubbish.* (Emphasis ours)

Commenting upon the possibilities inherent in such a situation, the learned justice stated (p. 802):

> Had defendant (Davis) made all save one of the shippers in that territory, or all purchasers of postage at any postoffice therein, members of the association, and claimed that such limitations converted an otherwise public into a private carrier, the contention

> would be so absurd as to be instantly rejected. But the reasons for the rejection would be the *identical reasons* which demand rejection of defendant's contention in the instant case. (a) The proportion of the public served is so large as to be the public, (b) *the limitation is a mere device to hoodwink the law.* (Emphasis ours)

(Compare also *Parlett Cooperative* v. *Tidewater Lines* (1933), 164 Md. 405; 165 Atl. 313.)

In principle the situation is analogous to that before this Court in *Chicago, M. & St. P. R. Co.* v. *Minneapolis C. & Co. Asso.*, 247 U. S. 491. In that case it appeared that the appellant trunk line railroads owned most of the stock in and exercised control over an independently incorporated switching line which latter assessed a charge in addition to the line-haul rate on shipments to and from industries on its line. The State Commission held that, despite the corporate forms, the switching line was in fact the terminal of the owning carriers and that the separate charge for switching was discriminatory as compared with the free deliveries made by the proprietary companies to industries on their own rails. In upholding the decision of the Commission this Court said at p. 498:

> With the facts thus summarized, it is difficult to conceive of a plan for the control of a jointly owned company and for the operation of a jointly owned track more complete than this one is, and it is sheer sophistry to argue that, because it is technically a separate legal entity, the Eastern Company is an independent public carrier, free in the conduct of its business from the control of the two companies which own it, and, therefore, free to impose separate carrying charges upon the public.

And at p. 501:

> In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law, but,

> regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.

If the association, through Olson, is actually *serving* the consignors there can be no question that there is a holding out to serve the general public within the meaning of the statute. The vast sweep of business done by these consignee-members, not only as to diversity of commodities handled but in territory served—7 States—makes it clear that their suppliers must, in the nature of things, gridiron the eastern territory. We believe that the Commission was eminently sound in concluding that the course of conduct of the association was of sufficient importance to spell out a general holding out. As stated in *Terminal Taxicab Co.* v. *Kutz*, 241 U. S. 252, 254:

> the important thing is what it does, not what its charter says,

and in the same case this Court refused to recognize the contention that in limiting a portion of its services to hotels and their guests the company had divested themselves of a public status. The Court said:

> We do not perceive that this limitation removes the public character of the service, or takes it out of the definition in the act. No carrier serves all the public * * *. The public does not mean everybody all the time. (See *Peck* v. *Tribune Co.*, 214 U. S. 185, 190.)

A DECISION EXEMPTING FROM REGULATION OPERATIONS OF THE CHARACTER AND SCOPE DEVELOPED IN THIS CASE COULD THWART THE ENTIRE SCHEME OF REGULATION.

In placing freight forwarders under regulation Congress must have felt that their services were endowed with a public interest. Additionally, it made forwarders subject to the protection of the national transportation policy which, among other things, calls for the elimination of "de-

structive competitive practices" and the promotion of "sound economic conditions" for "all modes of transportation." If through the mere formal act of incorporation, a segment of the traffic consist of the breadth and diversity here encountered may escape the burdens and expense incident to regulation and, in addition, make substantial cash refunds to its patrons, there is no question that the regulated forwarder is doomed, at least as to this particular section of the country. Further, it is not to be assumed that, given judicial approval, the development will end here. Imitators are waiting for the "green light," and it may confidently be expected that appellee's organization will be greatly expanded, through a simple amendment of its by-laws.

We appreciate that par. (c) of section 402 does not *in terms* limit either the number of members in any "group or association" or the character of the commodities to be pooled or consolidated. But a brief review of the legislative history of the paragraph will shed considerable light on the bona fides of the association and the type of organization which Congress intended to exempt.

Part IV of the Act, as finally enacted, is a composite of S. 210, introduced by Senator Reed of the Senate Committee on Interstate Commerce on January 8, 1941; the House Committee substitute for that Bill; and H. R. 3684, introduced on February 28, 1941, by Chairman Lea of the House Committee on Interstate Commerce. Section 402(c), the crucial section in this controversy, did not appear in any of the original drafts. Its inclusion in the final draft was based upon representations of various associations which had been consolidating freight for their members for years and which feared that the definition of a freight forwarder carried in the original draft of H. R. 3684 might possibly be held to cover their operations. Hereunder we set forth a composite of the original definition in H. R. 3684 and the definition as amended following the public hearings. The additions are in italics; the deletions are underscored.

Par. (c) of section 402 was added to the Bill as a clarification.[12]

(e) The term 'freight forwarder' means any person which undertakes (otherwise than as a carrier subject to Part I, II, or III of this Act) *holds itself out to the general public* to transport *or provide transportation of* property *or any class or classes of property,* for compensation, in interstate or foreign commerce and which in the ordinary and usual course of performing or discharging any such *its* undertaking (1) *(A)* assembles and consolidates *or provides for assembling and consolidating* shipments of such property and performs *or provides for the performance of* break bulk and distributing operations with respect to such *consolidated* shipments, (2) *(B)* moves such property under a through rate or charge from point of collection, to point of destination *assumes responsibility for the transportation of such property from point of receipt to point of destination* and (3) *(C)* utilizes or employs *for the whole or any part of the transportation of such shipments* the instrumentalities or services of a carrier or carriers subject to Part I, II or III of this Act, or a combination of such instrumentalities or services.

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[12] In a "Memorandum Relating to Differences Between S. 210 as passed by the Senate and the House" by A. H. Perley, House office of Legislative Counsel, this explanation appears:

Section 402(c) of the House substitute contains provisions which are more in the nature of clarifying provisions rather than exemptions. This subsection was included as a supplement to the definition of "freight forwarders" in order to make sure that the bill will not be construed to bring under regulation shippers, groups of shippers or nonprofit associations of shippers, consolidating or distributing freight for themselves or other members, or to cover warehousemen, pool-car operators, and other shippers' agents engaged in consolidating or distributing pool cars and not assuming responsibility for the through movement of the property.

The transcript of the public hearings on H. R. 3684 (March, 1941) which is the only source of detailed information on the subject shows that these associations are invariably operated in connection with a single commodity or the products of a specific industry.[13] It is worthy of note that appellee herein did not appear to protect its interests.

The Committee members recognized the danger inherent in this matter of exemption. At (Tr. 322) Representative Kennedy stated to one of the witnesses seeking exemption:

> Well, that may be so, but as I view it we are likely to have so many exceptions that the first thing you know we will have exempted so many that there will be practically none, if any, included under this proposed law. Everybody seems to want a favored position, and if they were all granted special treatment we would not have any uniform system of regulations or control.

It is unfortunate, of course, from the standpoint of the regulated forwarding industry, that Congress did not see fit to include in par.(c) of section 402, some language which would spell out more definitely its intention to limit exempt pooling to single commodities or at least to related products of specific industries. But its failure to do so should not be deemed as in disagreement with those who proposed

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[13] E. g. the Aircraft Traffic Asso., dealing with materials for aircraft production (Tr. p. 193); Westfield Paper Company—paper products (Tr. p. 296); Kalamazoo (Mich.) Paper Producers—paper products (Tr. p. 300); Wisconsin Paper Group—paper products (Tr. p. 301); Chicago Traffic Bureau—food products (Tr. p. 382); Furniture Mfrs. Asso.—furniture (Tr. p. 383); Chicago Furniture Mfrs. Asso.—furniture (Tr. p. 387); Miami Valley Paper Shippers Asso.—paper products (Tr. p. 390); Furniture Mfrs. Asso., Grand Rapids, Mich. (Tr. p. 461); New England Paper Service Asso.—paper products (Tr. p. 498); Hickory (N. C.) Chair Mfg. Co.—furniture (Tr. p. 502); Security Warehouse Company, High Point, N. C.—furniture (Tr. p. 513); National Retail Furniture Association—furniture (Tr. p. 515).

such limited exemption. It might more properly be ascribed to the difficulties of draftsmanship attendant upon any attempt to particularize. It cannot fairly be assumed that Congress intended an exemption to be broader than that requested.

This lack of particularization on the part of Congress no doubt influenced the Commission in its first decision in concluding that appellee's operations came within the preview of the exemption, a conclusion to which the Commission now adheres in respect of shipments sold on an "f.o.b. origin" basis. When that decision was rendered the record did not distinguish between such shipments and those sold on an "f.o.b. destination" basis. We submit, therefore, that the Commission is eminently sound in holding that the latter class of shipments are beyond the pale of exemption.

CONCLUSION.

It is entirely irrational to suppose that Congress in one breath would put the freight forwarder under complete regulation and under the protection of the national transportation policy, and in the next breath free from regulation a type of operation which sets up an impossible species of competition with respect to every item of traffic which the regulated forwarder might handle. As stated in *McDonald* v. *Thompson*, 305 U. S. 265, 266:

> As the Act (Part II, Interstate Commerce Act) is remedial and is to be construed liberally, the proviso defining exemptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms. (Parentheses added)

The decision of the Commission on further hearing is in complete accord with that principle and should be allowed to stand.

Respectfully submitted,

HARRY C. AMES,
Attorney for Appellant.

APPENDIX.

Excerpts from Transportation Act 1940, as Amended May, 1942.

Section 402(a) (5): The term "freight forwarder" means any person which (otherwise than as a carrier subject to Part I, II, or III of this Act) holds itself out to the general public to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to Part I, II, or III of this Act.

* * * * * *

Section 402(b). The provisions of this part shall not apply (1) to service performed by or under the direction of a cooperative association, as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined, or (2) where the property with respect to which service is performed consists of ordinary livestock, fish (including shellfish), agricultural commodities (not including manufactured products thereof), or used household goods, if the person performing such service engages in service subject to this part with respect to not more than one of the classifications of property above specified.

* * * * * *

Section 402 (c). The provisions of this part shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates, or (2) to the operations of a warehouseman or other shippers'

agent, in consolidating or distributing pool cars, whose services and responsibilities to shippers in connection with such operations are confined to the terminal area in which such operations are performed.

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Section 410(a). No person shall engage in service subject to this part unless such person holds a permit, issued by the Commission, authorizing such service; * * *

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NATIONAL TRANSPORTATION POLICY

[*Added September 18, 1940.*][*U. S. Code, title 49, notes preceding secs. 1, 301, 901, and 1001.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.